

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NANCY LOVELL)	
Claimant)	
)	
VS.)	
)	
AJ PLASTIC PRODUCTS/ KOLLER ENTERPRISES)	
Respondents)	Docket No. 1,002,469
)	
AND)	
)	
TRAVELERS CASUALTY & SURETY CO./ AMERICAN MANUFACTURERS MUTUAL INSURANCE CO.)	
Insurance Carriers)	

ORDER

Respondent and its insurance carrier Travelers Casualty and Surety requested review of the January 25, 2006 Award by Administrative Law Judge (ALJ) Steven J. Howard. The Board heard oral argument on April 26, 2006.

APPEARANCES

Michael R. Wallace, of Shawnee Mission, Kansas, appeared for the claimant. Stephen P. Doherty, of Kansas City, Missouri, appeared for respondent and Travelers Casualty & Surety Company (Travelers)¹. Michelle Daum Haskins, Kansas City, Missouri, appeared for respondent and American Manufacturers Mutual Insurance Company (American)².

¹ Travelers insured respondent from 11-01-03 through 3-04-04.

² American insured respondent from 11-1-01 to 11-01-03 and for whatever reason this carrier was not listed in the caption of the ALJ's Award.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that there is no contrary evidence to suggest claimant is not permanently and totally disabled. The parties also acknowledged that the temporary total disability (TTD) benefits referenced in paragraph 7 of the stipulations section of the Award is inaccurate. Claimant received 11.43 weeks of TTD benefits at a rate somewhat lower than the now-stipulated compensation rate of \$282.49. At this corrected rate they agree that claimant is entitled to a total of \$3,228.86 in TTD. Although this portion of the Award is inaccurate, later in the Award, on pages 7 and 12, the ALJ correctly recited and awarded the appropriate amounts of TTD. Thus, there is no need to modify the Award in this regard.

The parties also agreed that the 12.83 percent permanent partial impairment to the whole body awarded by the ALJ for claimant's bilateral upper extremity complaints is appropriate and should be affirmed, although the ultimate liability for that portion of the Award remains at issue and is dependent upon the ultimate date of claimant's accident(s).

Finally, the Award failed to address claimant's counsel's entitlement to a fee pursuant to his contract which has been filed of record with the Division. During oral argument, claimant's counsel requested the Board address this oversight. Neither of respondent's counsel objected and the award will reflect this modification.

ISSUES

The ALJ concluded claimant sustained injury arising out of and in the course of her employment with respondent in two separate series of accidents, with the first ending on July 16, 2002 (the date claimant first left work and had surgery on her elbow) and the second ending on March 4, 2004 (claimant's last date of work). According to the ALJ, the first accident involved bilateral cubital tunnel syndrome and based on the opinions of Drs. Sandow, Storm and Prostic, he found that the claimant sustained a 12.83 percent permanent partial impairment to the whole body.

Respondent and American, the carrier on the risk as of July 16, 2002, have not appealed this functional impairment finding. Rather, American contends claimant's claim is, as pled, one unending series of injuries culminating on a date of accident on March 4, 2004, her last date of work. Thus, based upon Kansas law, respondent's subsequent carrier on the risk as of that date, Travelers, is responsible for the 12.83 percent functional impairment as well as any other work-related impairments that might be found compensable.

The ALJ also went on to find that claimant suffered an additional series of injuries to her neck culminating on March 4, 2004, the date she last worked for respondent before having surgery on her neck. The ALJ indicated it was clear that claimant's work activities

of “repetitive overhead work activities permanently aggravated, accelerated, or intensified the underlying condition which resulted in her ultimate impairment.”³ The ALJ also found the claimant to be realistically unemployable and incapable of any substantial and gainful employment and therefore entitled to a permanent total disability award.⁴ Respondent and Travelers, the carrier on the risk as of March 4, 2004, were found responsible for this aspect of the claimant’s claim.

The respondent and Travelers request review of the compensability of claimant’s neck condition and her resulting permanent total disability. They argue the ALJ erred when he concluded that claimant sustained additional occupational injury after February 19, 2002, the date when claimant’s job changed and the overhead activities were purportedly eliminated. Moreover, respondent and Travelers (as well as American) contend that claimant’s neck condition is causally unrelated to her work activities and is therefore not compensable. Travelers also asserts that the claimant’s bilateral cubital tunnel condition and any other work-related injury is the responsibility of the prior carrier, American. Thus, that portion of the ALJ’s Award should be affirmed.

Claimant contends that she not only sustained a bilateral upper extremity injury resulting in a 12.83 percent permanent partial impairment, but after she returned to work she then sustained a subsequent compensable injury to her neck which has left her permanently and totally disabled. Claimant maintains her repetitive work activities with respondent through March 4, 2004, her last day of work, aggravated her neck and left her with spinal stenosis and myopathy. Claimant argues that American was the carrier at the time of her bilateral arm claim accrued and that Travelers was the carrier on day she left work to have neck surgery. Therefore, the ALJ’s Award should, in claimant’s view, be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties’ briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was a long-time employee for respondent serving as a lead packer. In this position claimant would work with other packers, making sure they each had enough materials to perform their work duties and when each of those individual packers went on break, she would step in for them, performing the various packing jobs.

³ ALJ Award (Jan. 25, 2006) at 11.

⁴ *Id.* at 12.

In late 2001, claimant's job changed. She testified that there were a series of layoffs and as a result, there were fewer people doing the same amount of work. Claimant was required to perform the work of a packer, repetitively performing the same task during her entire shift. This job required her to look up, and turn her head at angles while using both hands to push and pull materials weighing up to 50 pounds.

Claimant testified this job made her right hand hurt beginning sometime in late 2001. She also noticed numbness and then pain in her left hand. As her job continued into 2002, she noticed pain in her shoulders and her neck. Her symptoms would increase over the work week and then on the weekend, they would subside.

She filed a workers compensation claim originally alleging a series of injuries commencing August 19, 2001 and ending February 19, 2002.⁵ According to claimant, while working for respondent on February 19, 2002 she was bent over in an awkward position when everything "locked up", including her arm and hand and she experienced a burning sensation in her neck. Claimant testified that she was unable to move for approximately 30-45 minutes. Claimant later returned to the line to work and after an hour, she experienced the same sort of event. Claimant testified that after that day, she never returned to working on the line.⁶ But she has also testified that she worked her regular duty up until her last date of work in 2004.⁷

Treatment was provided and as of May 2002, claimant was directed by Dr. Vito Carabetta, the treating physician, to avoid overhead lifting while working. At one point claimant testified that once she began receiving treatment, she was on restricted duty and had no overhead lifting.⁸ At other times claimant testified that after she began having problems she was reassigned to other repetitive line duties, but that she did those jobs without limitation or restriction as they were considered full duty jobs until March 4, 2004.⁹ In still another instance, claimant testified that respondent did not honor her overhead lifting restriction thus continuing her normal working duties.¹⁰

⁵ During the course of this claim, claimant amended her date of accident to ultimately include a series of injuries continuing until March 4, 2004, her last date of work. As a result, Travelers was brought into this claim.

⁶ R.H. Trans. at 26.

⁷ *Id.* at 30-31.

⁸ P.H. Trans. (Mar. 18, 2003) at 12.

⁹ R.H. Trans. at 19.

¹⁰ *Id.* at 13-14.

In July and September 2002¹¹, claimant had cubital tunnel surgery on her elbows at the direction of Dr. Bradley Storm. Following her two separate surgeries and post-procedure follow-up, Dr. Storm rated claimant as having a 5 percent permanent impairment to each upper extremity which when combined, yields a 6 percent whole body impairment. In December 2002 he released her to return to work without restriction.

Following her recuperation, she returned to work without any restrictions. Claimant testified that but for her subsequent neck problems, she would have continued to work for respondent and that her bilateral arm condition did not prohibit her from working.

Claimant continued working in jobs on the line for respondent, but because of a lack of personnel, in May 2003 the respondent changed the work schedule to 10 hours per day, working 5-6 days and sometimes 7 days per week. Claimant's job was working on the fish tank and the cup line and according to her, this job was not lighter in nature and it was repetitive. By June 2003 claimant could no longer move her neck and was experiencing pain in her shoulder and hands. She was also complaining of numbness down her legs. Claimant was taken off work for 3-4 days and then returned to work.

According to claimant, she continued to perform her regular work duties until March 4, 2004, when she left work to have surgery on her neck. Claimant ultimately had surgery under the direction of Dr. John Clough. The cause of this surgery and claimant's resulting impairment is at the heart of the parties' dispute.

Dr. Clough first saw claimant on May 5, 2003. At that time, he saw her for purposes of providing a second opinion relating to her cervical disease identified as Ossification of the Posterior Longitudinal Ligament (OPLL). This is a condition of the posterior longitudinal ligament, a long thin ligament which is right behind the spinal bones, thickens and ossifies abnormally, calcifying and growing. The cause of this condition is not known¹² although it is more commonly seen in the middle aged and elderly Japanese population.¹³ All of the physicians agree the OPLL was not caused by claimant's work activities. As the ligament becomes more stiff, the spinal canal becomes constricted, resulting in stenosis. As the condition advances, the symptoms will become more pronounced and will spread.

¹¹ Claimant left work on July 16, 2002 for surgery on her right elbow. This is the "date of accident" for the bilateral elbow claim according to the ALJ. Respondent and both its carriers do not dispute the compensability of this condition. However, American contends the ALJ erred in designating July 16, 2002 as the appropriate accident date. Rather, American contends claimant's last date of work is the appropriate accident date.

¹² Clough Depo. at 7.

¹³ Prostic Depo. at 6.

In June 2003, Dr. Clough assigned a permanent restriction of no overhead work. Claimant testified that respondent did not accommodate this restriction and she continued with her regular job duties. According to Dr. Clough, overhead work requires the neck to be extended and given the limited space within claimant's spinal canal due to the OPLL and the other conditions occurring within her neck, that maneuver is likely to cause further damage.

In claimant's situation, she began to experience bowel and bladder problems along with her upper extremity, neck, shoulder and leg complaints. She also began to drag her right foot when she walked. Dr. Clough recommended surgery in October 2003 but claimant wanted to wait until 2004. On March 17, 2004, claimant had a posterior cervical laminectomy and fusion which helped to provide more room within the spinal cord, thereby lessening the pressure on the nerves.

Overall, Dr. Clough believed claimant had a good result from her surgery, although she still has some weakness and numbness in her arms and hands. Dr. Clough testified that claimant also suffers from herniated disks at C3-4, C4-5 and C5-6 along with degenerative disease in the balance of her cervical region and in her right shoulder, myofascial strain and cervical myelopathy. Put simply, this claimant has a narrowing of her spinal canal due to multi-factorial conditions and not solely due to OPLL. Each condition is separate and distinct from the other. When asked if looking up or down would cause a micro-trauma to the spinal canal, he opined that such activities would have exacerbated her symptoms. Simply put, Dr. Clough testified that while work did not cause claimant's OPLL, that condition as well as her spondylitic neck disease were aggravated by her repetitive work activities.¹⁴ He further testified that he believed she was unable to return to her former work and that she was permanently and totally disabled.¹⁵

When the parties were unable to agree upon claimant's functional impairment, the ALJ appointed Dr. Theodore Sandow to perform an independent medical examination pursuant to K.S.A. 44-510e. Dr. Sandow was asked to assess whether claimant had sustained any new or additional impairment (over and above any pre-existing impairment).¹⁶ Following his examination he opined claimant bears an 18.5 percent permanent partial impairment to the whole body due to the bilateral cubital tunnel syndrome.

Claimant was also examined by Dr. Edward J. Prostic both before her bilateral elbow surgery and after her neck surgery. Dr. Prostic concluded that claimant had

¹⁴ Clough Depo., Exs. B and F.

¹⁵ *Id.* at 30.

¹⁶ Claimant has apparently received earlier workers compensation settlements regarding her neck and right upper extremity.

sustained repetitive minor traumas as a result of her work activities and that caused an aggravation of her cervical spinal stenosis, a weakness of the leg and possibly both arms as well as her bilateral cubital tunnel syndrome. He further indicated that claimant's overhead work activities and the cervical herniations created a compression of the spinal cord and that this exposes her to cervical myelopathy. Cervical myelopathy is a condition of compression of the spinal cord such that there are long tract signs with weakness of the leg in one or both arms and sometimes there is development of radiculopathy.¹⁷

Following his second examination, Dr. Prostin issued a rating pursuant to the 4th edition of the *Guides*¹⁸. Dr. Prostin opined as follows:

She has had a cervical decompression and fusion at multiple levels (10% body as a whole for the first level and 1% each for the three additional levels). For loss of motion of her cervical spine, she has 10 percent body as a whole for loss of flexion and extension, 8 percent for loss of lateral bend, and 12 percent for loss of rotation. For neurologic deficits with weakness of the upper extremities, she had 30 percent impairment of each upper extremity and 10 percent of each lower extremity. She also has an additional 15 percent body as a whole for difficulties with bowel and bladder control.¹⁹

When combined, Dr. Prostin's ratings yield a total of 64 percent permanent partial impairment to the body as a whole. Dr. Prostin also testified that 6 percent could be subtracted for a preexisting impairment, which would leave the claimant with a 58 percent impairment. He assigned the following restrictions: avoid constant standing or walking, no significant climbing, squatting, kneeling, running or jumping and no lifting over 20-25 pounds occasionally. She should refrain from any overhead activity, vibratory equipment or activities that require any significant rotation of the head. Finally, she should not do any forceful prolonged gripping.

Dr. Prostin further testified claimant had lost the ability to perform 6 of the 11 tasks set forth in Michael Dreiling's vocational analysis. Alternatively, Dr. Prostin testified that claimant was essentially unemployable²⁰ a conclusion echoed by Mr. Dreiling.²¹ Although Mr. Dreiling testified that at best, claimant might be able to earn \$6-7 per hour.

¹⁷ Prostin Depo. at 19.

¹⁸ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th edition.

¹⁹ Prostin Depo., Ex. 6.

²⁰ *Id.* at 24.

²¹ Dreiling Depo. at 22.

After hearing all this evidence, the ALJ concluded claimant suffered two separate accidents, the first bilateral cubital tunnel condition, occurring on July 16, 2002. He assigned an 12.83 percent permanent partial impairment to the whole body as a result, and assessed against respondent and its carrier on the risk as of July 16, 2002, American.

The ALJ then concluded claimant sustained a second injury to her neck that culminated on March 4, 2004, her last date of work. He made this decision based upon claimant's testimony that she worked her full duty job up until her last date of work, performing her repetitive work duties as a packer. Although her tasks might have changed somewhat, the changes in her work activities were not intended to lessen her work demands. Thus, the ALJ concluded she sustained microtraumas up until her last date of work, March 4, 2004.

He further concluded that she was permanently and totally disabled as a result of her work-related injuries. He specifically concluded claimant's "occupational activities injured her spinal cord, increasing her symptoms and accelerating the development of the myelopathy."²²

The Board has carefully considered the parties' arguments, the medical testimony and the claimant's own testimony and finds that the ALJ's factual findings and conclusions should be affirmed.

There is no dispute within the record or among the parties that claimant has sustained a bilateral cubital tunnel condition and that this condition was caused by her work activities. Rather, the dispute is over the "date" that accident occurred. This argument is one that frequently occurs in the workers compensation field when insurance carriers change and has proved to be a challenge for all parties involved.

Following creation of the bright line rule in the 1994 *Berry*²³ decision, the appellate courts have grappled with determining the date of accident for repetitive use injuries. In *Treaster*,²⁴ which is one of the most recent decisions on point, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or micro-traumas (which this is) is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. *Treaster* also focuses upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use or micro-trauma injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

²² ALJ Award (Jan. 25, 2006) at 11.

²³ *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

²⁴ *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.²⁵

Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.²⁶

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Kansas Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

In this instance, claimant first left work on July 16, 2002 to have surgery on her right elbow. Shortly thereafter, she had surgery on her left elbow and when she recovered, claimant returned to work. Claimant was released to full duty and has testified that but for her subsequent neck problems, she would still be working. There is no evidence of any subsequent worsening after she was rated and released from treatment. Based upon the totality of the evidence, the Board finds the ALJ's decision finding July 16, 2002, the date claimant left work due to her bilateral cubital tunnel condition, as the appropriate accident date for that condition should be affirmed. Respondent and its carrier, American, are responsible for the TTD and permanency associated with the bilateral cubital tunnel condition.

As for American's argument that the cubital tunnel condition is really a part of the subsequently diagnosed neck condition, the Board is not persuaded. Based upon this record, it is clear that claimant had a bilateral arm condition that was independent of and unconnected to her neck complaints. Thus, it is logical to treat this aspect of claimant's claim separately from her subsequent neck condition.

Turning now to claimant's neck complaints, the Board is equally unpersuaded by Travelers argument that to the extent claimant sustained any work-related injury, that accident occurred before February 19, 2002, the date respondent states it changed claimant's job, thereby limiting any further injurious exposure and limiting Traveler's exposure as it was not on the risk on that date.

²⁵ *Id.* at Syl. ¶ 3.

²⁶ *Id.* at Syl. ¶ 4.

The difficulty with Travelers' argument is that claimant has testified that her work activities continued to be overhead and repetitive. Admittedly, claimant has testified that at least at some point, respondent limited her overhead work. But at other times she testified that her restrictions were not honored. When the record is viewed as a whole, it appears that claimant's work activities were, at all times, repetitive, and that while she may have been reassigned from her position as a packer, which was more strenuous, to the fish tank and cup lines, a job that is in her view was no lighter and repetitive. Then, her job hours were changed to 10 hours per day, working 5, 6 and sometimes 7 days a week. This demanding schedule as well as the repetitive activities increased her neck complaints.

Dr. Clough and Dr. Prostic both testified that claimant's continued work activities certainly aggravated her neck condition. Travelers contends the OPLL was not caused by work and the Board agrees with that contention. However, the medical testimony indicates that while work did not cause that condition, work aggravated that condition. And not only did work aggravate the OPLL, claimant has cervical herniations which further compromised the space within her spinal canal, thereby causing her symptoms. In other words, claimant's condition is multi-factorial and work is aggravating those conditions.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.²⁷ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.²⁸

In this instance, claimant's various neck problems were, based upon the testimony of both the claimant and the physicians, aggravated by her work activities. And that condition culminated in an accident on March 4, 2004, when she left work to have surgery to address her neck complaints. Those same physicians have also testified that claimant is permanently and totally disabled as a result of this condition and no one disputes that contention. Accordingly, the Board agrees with the ALJ's conclusions and therefore affirms the same.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated January 25, 2006, is affirmed in all respects except that the Award is modified to reflect a lien in favor of claimant's counsel for attorney fees consistent with K.S.A. 44-536.

²⁷ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

²⁸ *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

IT IS SO ORDERED.

Dated this _____ day of May, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Stephen P. Doherty, Attorney for Respondent and Travelers Casualty & Surety Co.
Michelle Daum Haskins, Attorney for Respondent and American Manufacturers
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director